

90-356

Supreme Court, U.S.

FILED

AUG 28 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ANDREW G. YARTZOFF, Petitioner,

v.

WILLIAM K. REILLY, ADMINISTRATOR OF THE
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

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507 West Norma Street
P.O. Box 176
Gila Bend, Arizona 85337

Pro Se

43



QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. #2000e et seq (1976): (a) create a cause of action for a person who is the victim of a discriminatory job-performance evaluation but who cannot demonstrate that the evaluation constituted the cause of his or her being denied a specific job or promotion and (b) provide that a plaintiff who is the subject of illegal evaluations is entitled at a minimum to have any discriminatory records purged from his or her personnel files or to an equivalent remedy?

(Note: Petitioner reserves the right to argue Questions 2 and 3 in the event certiorari is granted on the above question, but does not include Questions 2 and 3 among the reasons for the grant



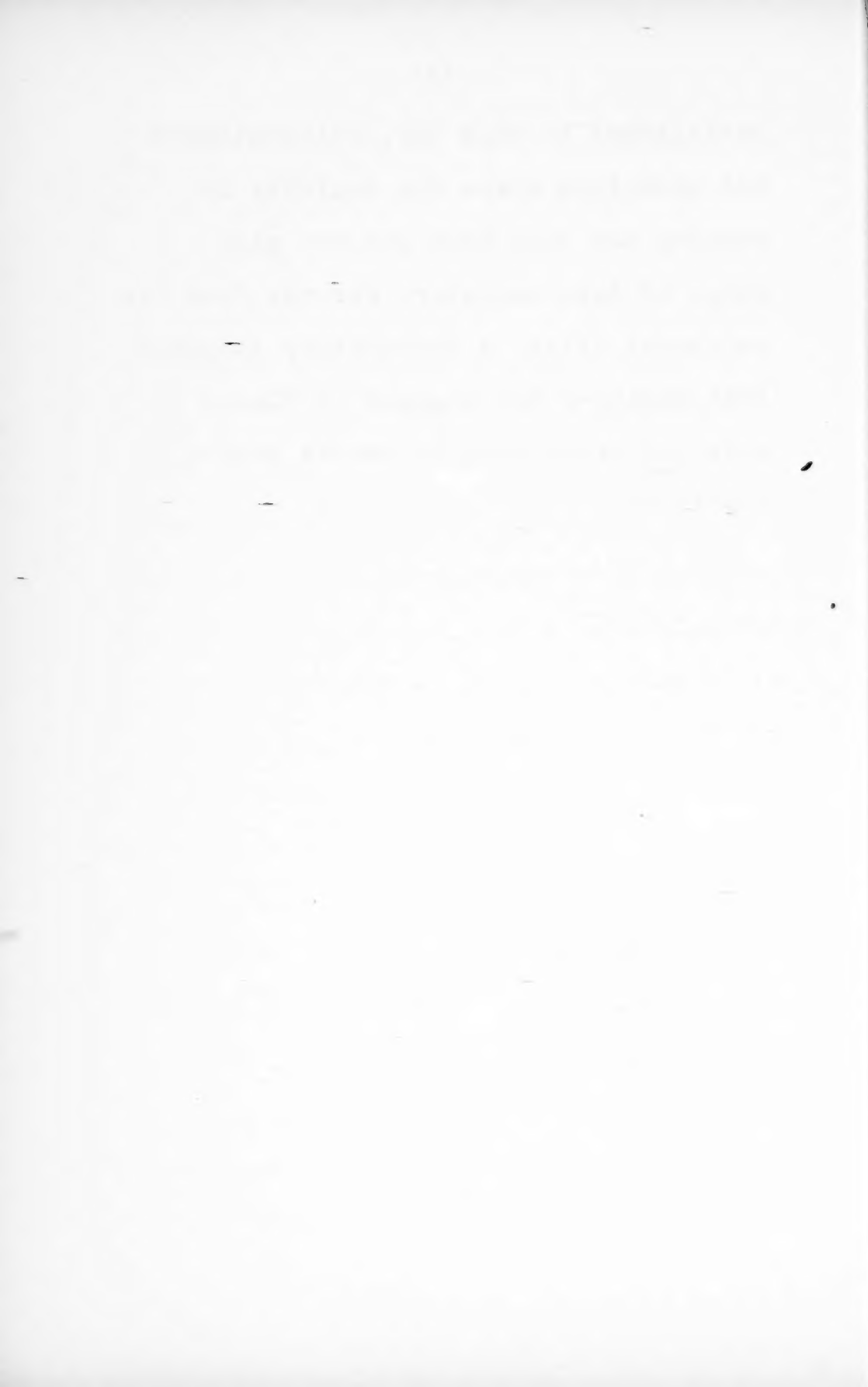
of certiorari.)

2. Does Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. #2000e et seq (1976): (a) create a cause of action for a person who is the victim of a discriminatory removal of his or her duties and responsibilities and substitution by lesser ones but who cannot demonstrate that the removal constituted the cause of his or her denied a specific job or promotion and (b) provide that a plaintiff who is the subject of illegal removal of duties and responsibilities is entitled to an order requiring each party to file by a certain date a proposed judgment providing relief for plaintiff?

3. Does an employer have an entitlement to have an employee's Title VII case dismissed pursuant to Rule 41 (b) of the Federal Rules of Civil Procedure because the employee did not prove



entitlement to back pay, reinstatement and promotion where the employee is seeking not only back pay but also purge of discriminatory records from his personnel files, a declaratory judgment that employer has engaged in biased acts and order that it ceases such a practice?



LIST OF PARTIES

The parties to the proceedings below were the petitioner Andrew G. Yartzoff and the respondent William K. Reilly, Administrator of the United States Environmental Protection Agency.



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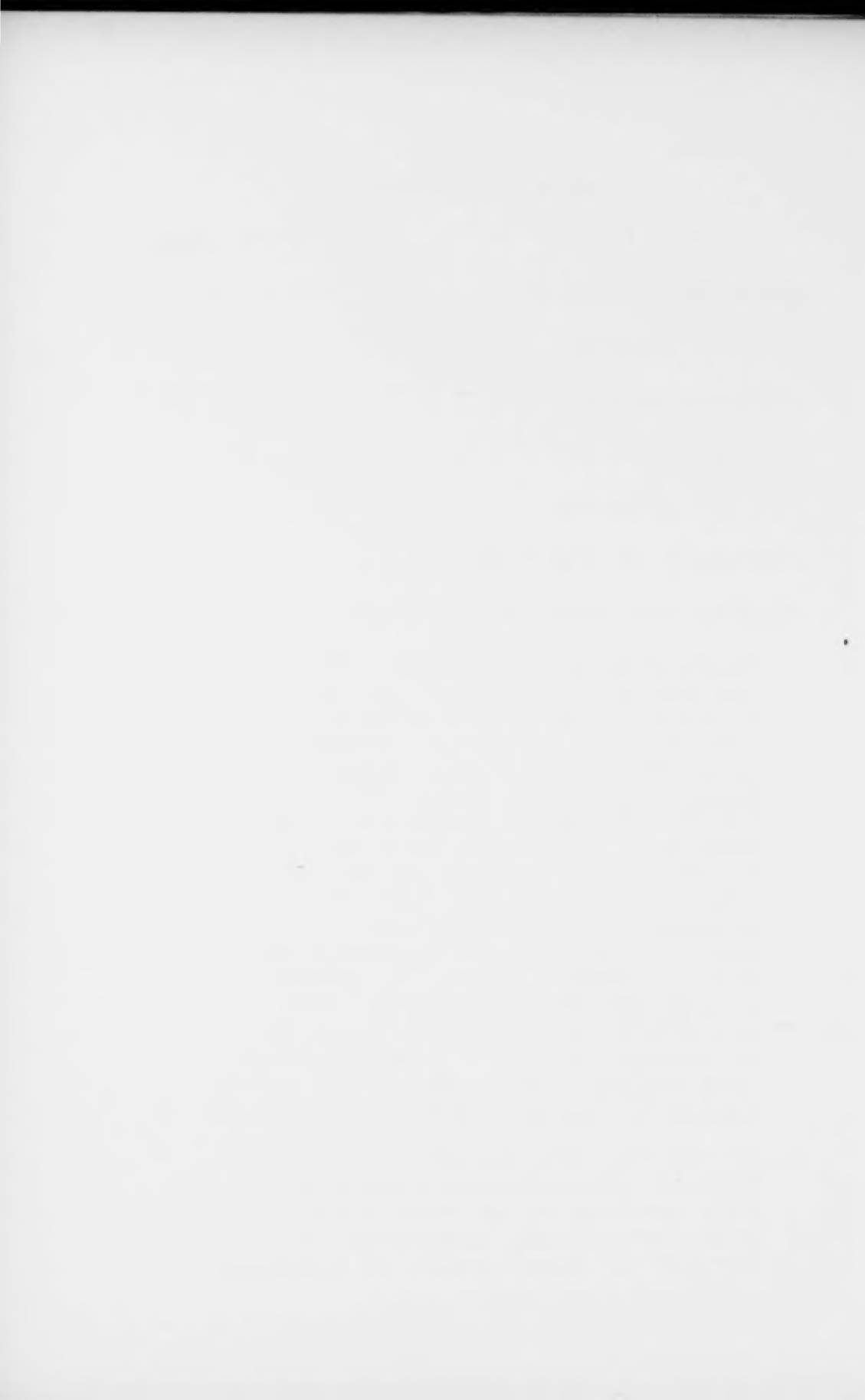


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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

ANDREW G. YARTZOFF, Petitioner,

v.

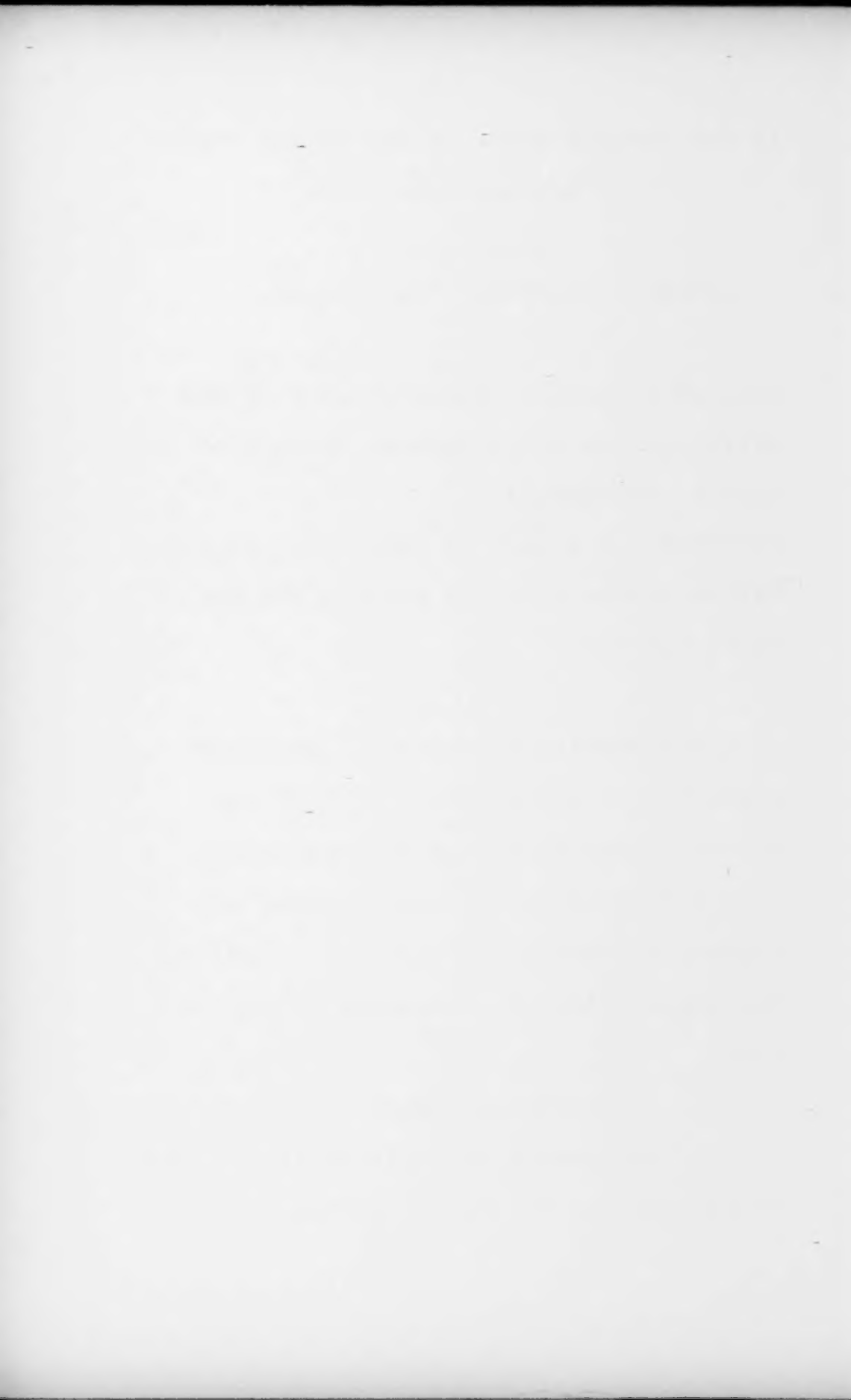
WILLIAM K. REILLY, ADMINISTRATOR OF THE
UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

The petitioner Andrew G. Yartzoff respectfully prays that a writ of certiorari issue to review the memorandum disposition of United States Court of Appeals for the Ninth Circuit, filed in the above-entitled proceeding on May 30, 1990.

OPINIONS BELOW

The memorandum disposition of the Court of Appeals has not been reported. It is



reprinted in the appendix hereto, p.la infra.

The memorandum disposition of the United States District Court for the District of Oregon has not been reported. It is reprinted in the appendix hereto, p.la , infra.

JURISDICTION

Invoking federal jurisdiction under Title VII of the Civil Rights Act of 1964, pursuant to 42 U.S.C. #2000e et seq., the petitioner brought this suit in the District of Oregon. On October 12, 1988, the District of Oregon granted respondent's motion under Rule 41(b) of the Federal Rules of Civil Procedure to dismiss for failure of proof of any real damage in this case.

On petitioner's appeal the Ninth Circuit on May 30, 1990, filed a memorandum also called disposition affirming the

District of Oregon's order. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. #1254(1).

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. #2000e et seq.

STATEMENT OF THE CASE

On June 12, 1985, District of Oregon granted EPA's motion for summary judgment on two consolidated complaints filed in 1980 and 1981.

On March 12, 1985, judgment was entered whereby District of Oregon was affirmed in part and reversed in part by the Ninth Circuit Court of Appeals.

Yartzoff v. Thomas, 809 F.2d 1374 (Ninth Cir. 1987)

On October 12, 1988, the remaining three issues:

" 1. whether the reassignment or

nonassignment of work in August, 1979 through February, 1980 was in retaliation for filing complaints of discrimination and for participating in Title VII negotiations;

2. whether the April 28, 1980 performance rating of "below average in cooperation" was given in retaliation for filing complaints of discrimination; and

3. whether the reassignment or nonassignment of work in February, 1981 was in retaliation for filing complaints of discrimination" were tried by the court. (Appendix, Opinion of District of Oregon, p. 2, lines 20 and 23, and p. 3, lines 1 through 6).

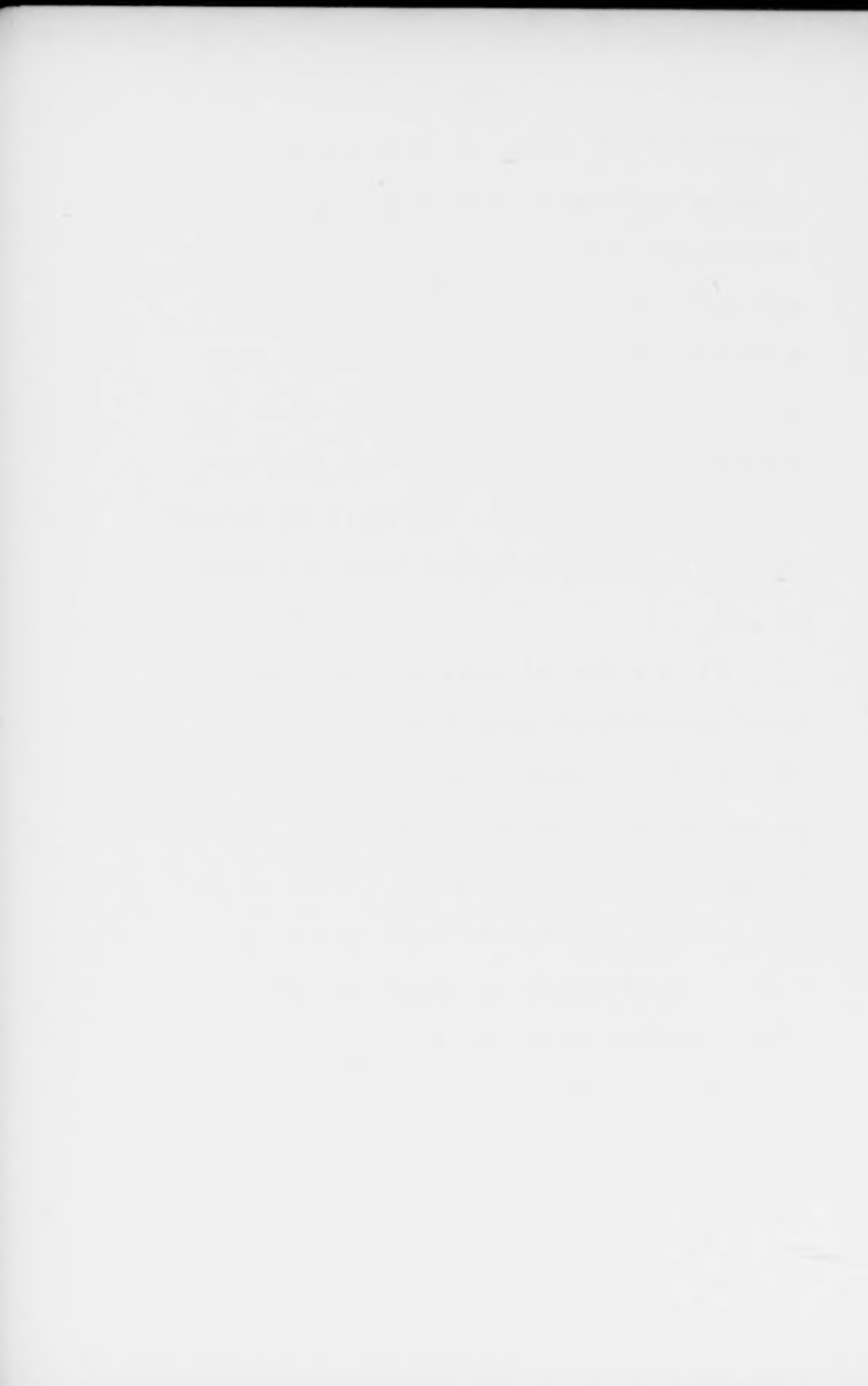
In essence plaintiff sought judgment for back pay, declaratory judgment that defendant's practice has violated and continues to violate the rights of plaintiff as secured by Title VII of the Civil



Rights Act of 1964, an injunction enjoining defendant from engaging in any employment practice which discriminates against plaintiff on the basis of Russian national origin, for loss of promotional opportunity and such other and further relief as may be necessary and proper. (Docket Sheet, District of Oregon (July 13, 1988) Proposed Pretrial Order p. 13)

At the end of plaintiff's case in chief government made a Rule 41 motion (Tr. p. 51). Then "The Court: Well, I'm going to deny the motion and I'll ask you to call your first witness." (Tr. p. 56) and shortly thereafter "The Court: All right. I am going to grant the government's motion based upon the failure of proof of any real damage in this case." (Tr. p. 59)

On June 6, 1989, petitioner filed



notice of appeal to Ninth Circuit Court of Appeals which on May 30, 1990, affirmed the District of Oregon. (Appendix, Memorandum Decision Ninth Circuit Court of Appeals)

REASONS FOR GRANTING WRIT

I

a. There exists a conflict between the Ninth Circuit that holds that a Title VII cause of action is created when plaintiff states a prima facie case under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) under which he or she must make a showing that he or she would have got a job or promotion "but for" an illegal act of discrimination. The District of Columbia Circuit holds contrary to that in that a Title VII cause of action can be stated even when plaintiff cannot demonstrate that an illegal act of discrimination constitutes the cause of his being denied a specific job or promotion.



The Ninth Circuit interprets this court's decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) as stating necessary conditions for establishment of a prima facie case of employment discrimination under Title VII. This standard links the questions of statutory wrong and statutory remedy. To state a prima facie case under McDonnell Douglas, a plaintiff must make a showing that he would have got a job or promotion "but for" an illegal act of discrimination. If he does so, he shifts to the employer the burden, not only of articulating a defense against the charge of discriminatory treatment, but of rebutting the prima facie of entitlement to one or more of a particular set of remedies--back pay, reinstatement, or preferential hiring or promotion.

The linkage of the questions of



legal wrong and legal remedy is entirely appropriate in view of the facts of McDonnell Douglas and of similar cases, typically cases in which a plaintiff claims that he was rejected for an employment vacancy on grounds of race or reprisal, that the harm he suffered were denial of the particular job sought, and that the appropriate remedy is back pay plus preferential hiring or promotion. b. It is obvious, however, that a plaintiff may suffer harms from discrimination that fall short of demonstrable loss of a job or a promotion. An unfavorable employee merit promotion appraisal to be reviewed in connection with future decisions concerning promotion could both prejudice the employee's superiors and materially diminish his or her chances for advancement. If employer removes from an employee duties and responsibilities as reprisal, the



employee suffers with respect to the terms, conditions and privileges of his employment and promotion is delayed.

The court in McDonnell Douglas stated explicitly that "the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." A plaintiff, it said, "may" establish a prima facie case by citing the four McDonnell Douglas factors. But the court made clear that a plaintiff would not be required to do so in all cases. The case before the bar is that in which the McDonnell Douglas test would not be appropriate.

In the case of Earl Smith, Jr. v. Secretary of the Navy, 25 EPD #31533 the District of Columbia Circuit answering the question: whether Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. #2000e et seq. (1976) creates

a cause of action for a person who is the victim of a discriminatory job-performance evaluation, but who cannot demonstrate that the evaluation constituted the cause of his being denied a specific job or promotion said:

"We hold that Title VII does provide a cause of action in this case, and that a plaintiff who is the subject of illegal evaluations is entitled at a minimum, to have any discriminatory records purged from his personnel file. We hold, further, that a plaintiff who wins such relief is a "prevailing party" eligible for attorney's fees under the statute."

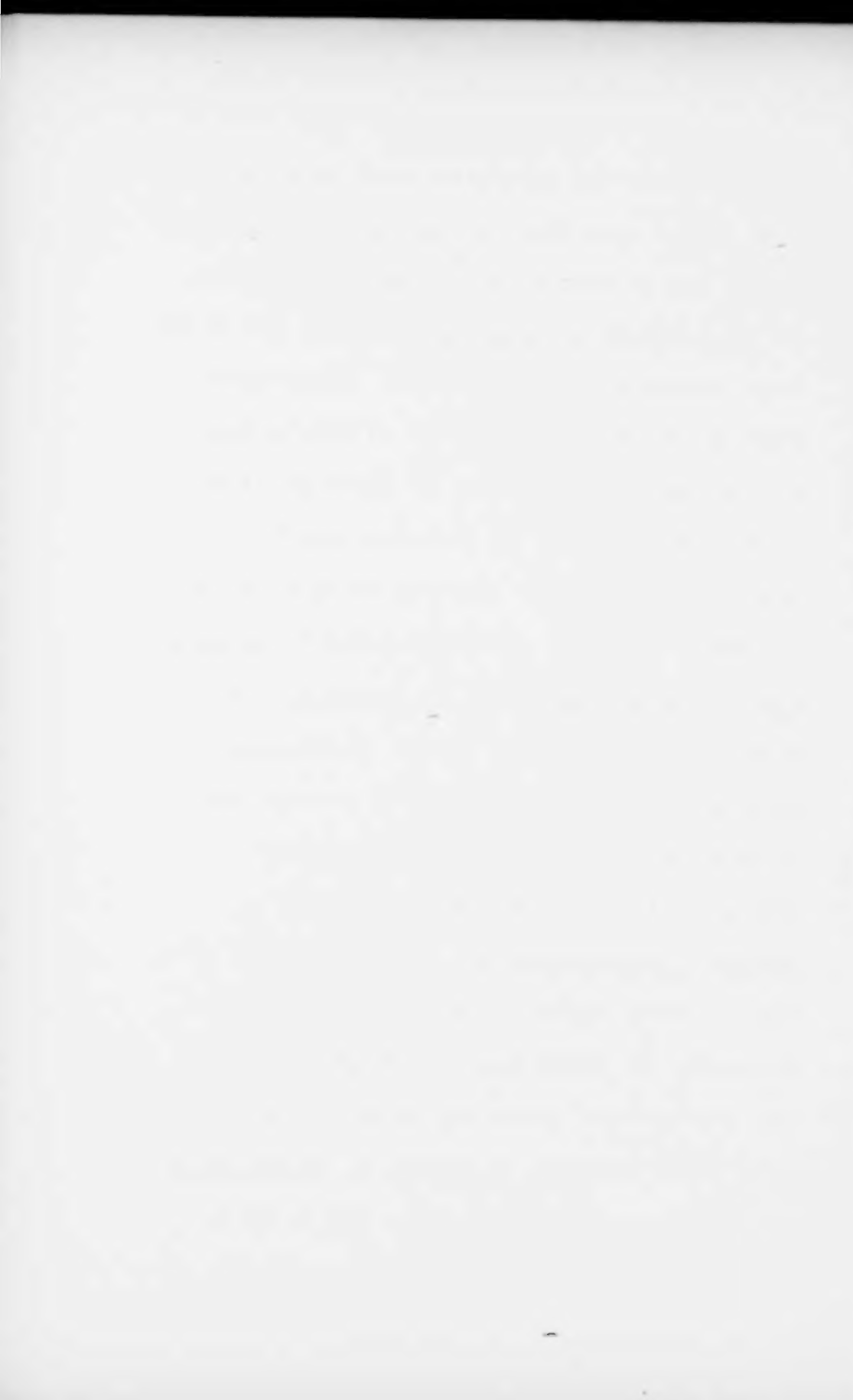
In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) the statement "the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations" appear in footnote, n. 13 on page 802. A plaintiff, it said, "may" establish a prima facie case



(by citing the four McDonnell Douglas factors) appears on page 802. The court made clear that a plaintiff would not be required to do so in all cases; thus, the court made this point explicitly when called upon to construe McDonnell Douglas in the later case of International Brhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977): "The company and union seize upon the McDonnell Douglas pattern as the only means of establishing a prima facie case of individual discrimination. Our decision in that case, however, did not purport to create an inflexible formulation. We expressly noted that "(t)he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from (a plaintiff) is not necessarily applicable in every respect to differing factual situations * * *" (Emphasis and first ellipsis in original)



Equally in conflict with the decision below are the following decisions in other and District of Columbia circuits. In Pantchenko v. C.B. Dolge Co., 581 F.2d 1052 (Second Circuit, 1978) (plaintiff states cause of action by alleging that former employer failed to furnish letter of recommendation in retaliation for filing discrimination charges with Equal Employment Opportunity Commission); Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977) (advising prospective employer that a former employee has filed sex discrimination charges violates Title VII); EEOC v. Western Publishing Co., 502 F.2d 599 (8th Cir., 1974) (EEOC is entitled to enforce subpoena to investigate charge that racial motivation underlay adverse employment references); Shehadeh v. Chesapeake and Potomac Telephone Co., 595 F.2d 711, 720 (D.C. Cir. 1978) (the decision of this



court clearly establishes that "dissimination of adverse references for reasons condemned by Title VII constitutes an unlawful 'employment practice' within (the) contemplation of the statute); Day v. Mathews, 530 F.2d 1083, 1084-1085 (D.C. Cir. 1976) (per curiam). (An illegal act of discrimination --whether based on race or some other factor such as a motive of reprisal-- is a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of back pay or preferential hiring.)

c. This Court's attention is deserved because Ninth Circuit decision regarding above mentioned clearly conflicts with the decision of the District of Columbia Circuit.

II

In the western states under Ninth Circuit jurisdiction reside a sizable

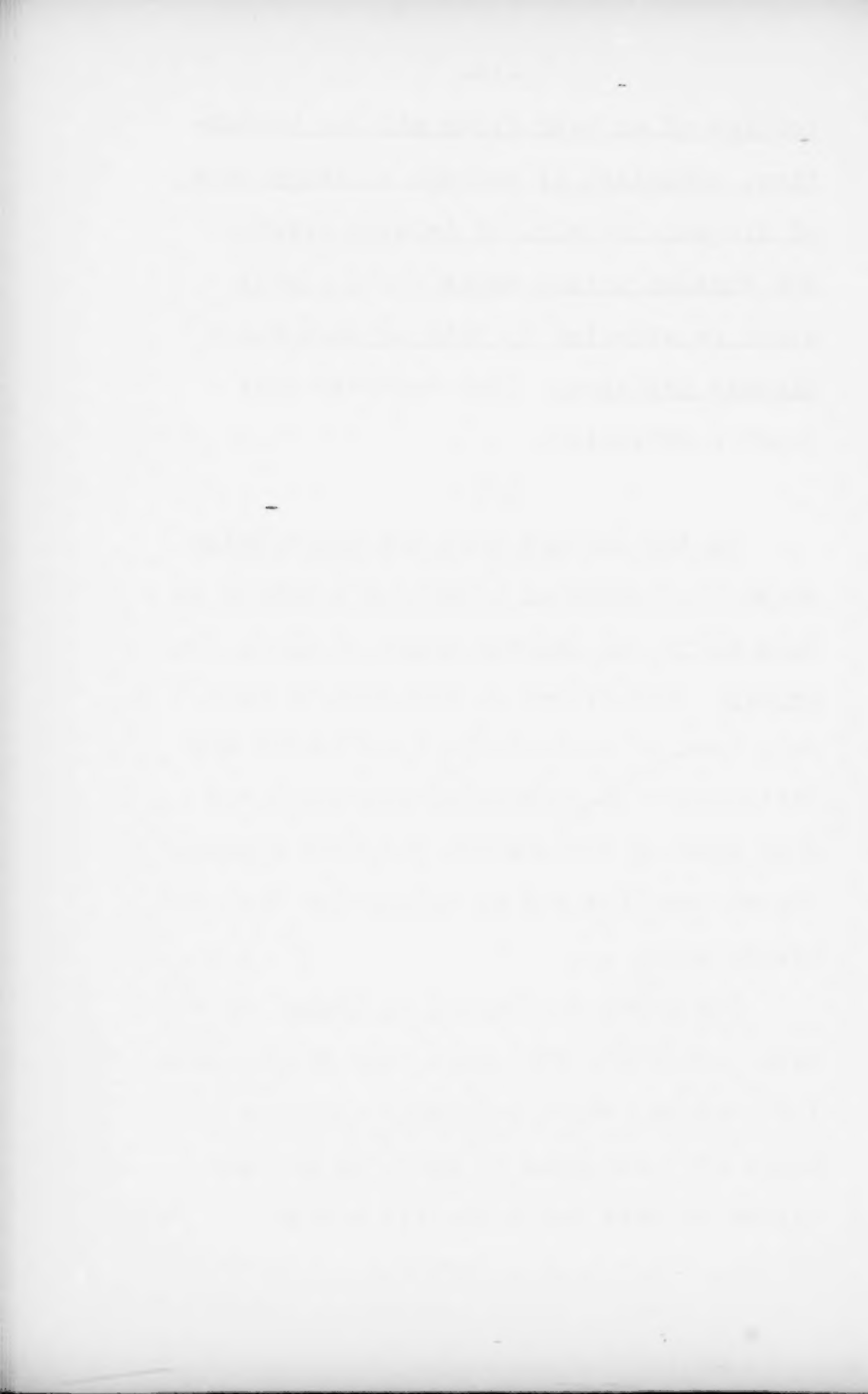


portion of an over fifty million population, comprised of persons of Negro race, of Hispanic origin, of Asiatic origin, and Russian origin whose civil rights might be affected by this adverse Ninth Circuit decision. Such deserves this Court's attention.

III

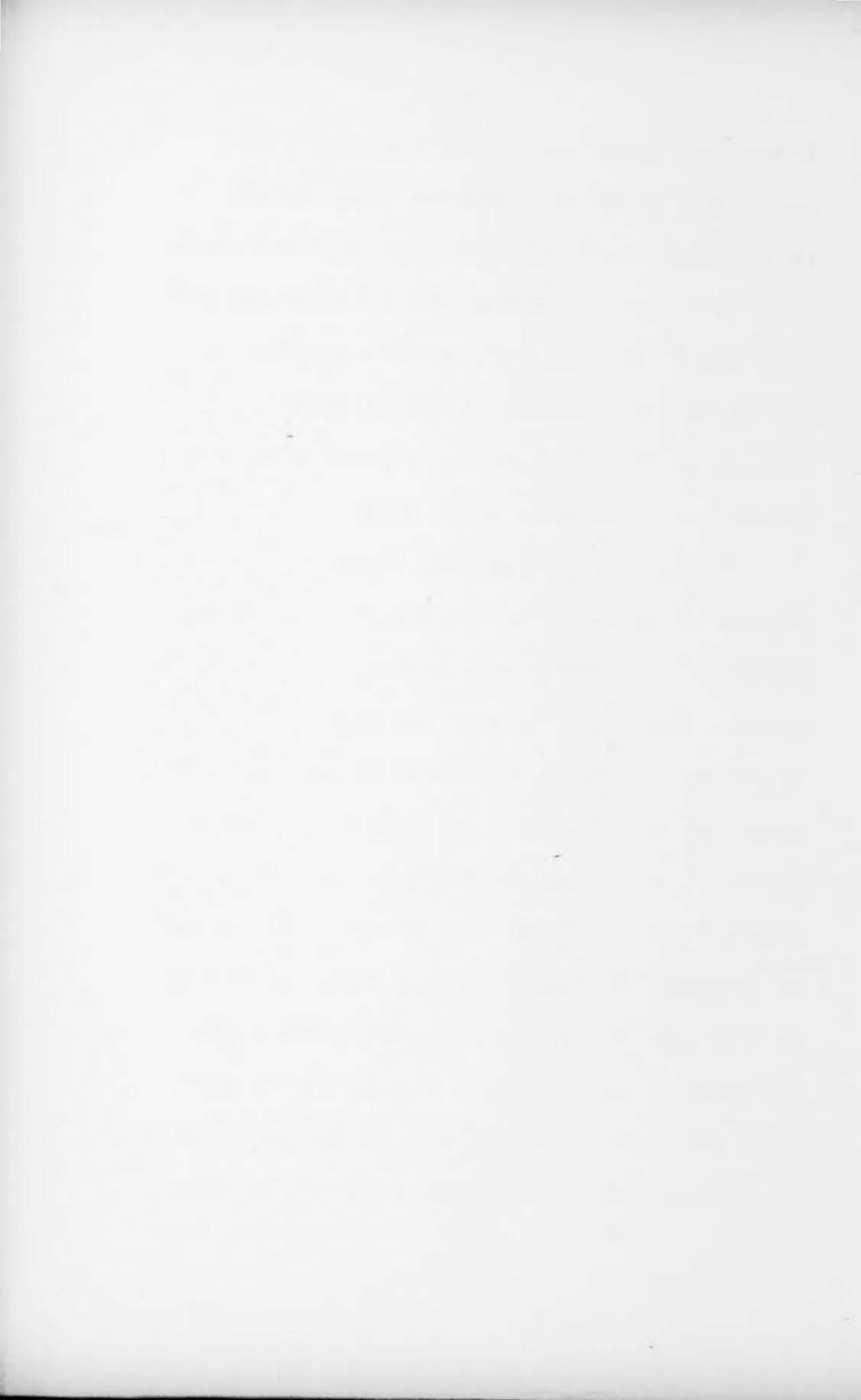
In the instant case the court below erred in dismissing appellant's action on Rule 41(b) of Federal Rules of Civil Procedure. Petitioner in addition to back pay, loss of promotional opportunity and destruction of underrated appraisal was also seeking declaratory judgment against biased practice and an injunction that EPA ceases such.

The court in Shepard v. Adams, 44 FEP Case 134 DCDC(1987) held that Smithsonian Institution, which refused to promote black GS-6 employee to GS-7, is not entitled to have her Title VII action



dismissed on ground that she would not have been promoted because desk audit determined that her position did not warrant GS-7 grade, where she is seeking not only back pay and retroactive promotion, but also declaratory judgment that Institution has engaged in biased acts and order that it cease such practices.

Venue for litigating these civil rights cases was in District of Oregon, District of Nevada and District of Columbia. Were petitioner to sue in District of Columbia he would probably have received a favorable decision in view of District of Columbia Ruling. But because petitioner selected the forum of District of Oregon, the decision is not favorable to him and Ninth Circuit feels that petitioner's case is not strong as to relief available to him and if he persists in litigation, costs and attorney's fees



might be assessed against him. Such would not be the case in the District of Columbia Circuit.

CONCLUSION

In the Ninth Circuit area as it stands now an employer can discriminate against an employee by calling him or her slang names identified with blacks, hispanics and of asiastic extractions, give adverse performance appraisals and as a reprisal remove important duties and responsibilities without punity and without a relief available for such an employee for the reason that only remedies available are back pay, promotion and new job hiring.

Thus for all the reasons stated, this petition for certiorari should be granted.

Petitioner was removed from his position in 1983. He appealed the removal to



U.S. Merit Systems Protection Board seeking reinstatement and back pay which gave to him an oral hearing four years later on September 10, 1987, but affirmed the removal. Petitioner then timely filed in the United States District Court for the District of Nevada, a COMPLAINT FOR RETALIATION FOR FILING COMPLAINTS OF DISCRIMINATION, TO REVIEW U.S. MERIT SYSTEMS PROTECTION BOARD DECISION TO REMOVE PLAINTIFF FROM CIVIL SERVICE AND FOR DENIAL OF DUE PROCESS, Civil Action No. CV-S-89-282 LDG (R.J.J.) which is still pending.

Plaintiff is entitled to be reinstated to his position and to all benefits should the court order his reinstatement which is likely because William K. Reilly, administrator of EPA is in default not having appeared or defended himself since April 1989 until Request to Clerk to Enter His Default pursuant to Rule 55(a) of Federal Rules of Civil Procedure was made in June 1990.



-18-

Respectfully submitted,

ANDREW G. YARTZOFF

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P.O. Box 176

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August 28, 1990

la

APPENDIX



Filed
May 30 1990

Cathy A. Catterson, Clerk
U.S. Court of Appeals

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * * *

ANDREW G. YARTZOFF, *

Plaintiff-
Appellant,

v.

WILLIAM K. REILLY,
Administrator,
United States
Environmental
Protection
Agency,

Defendant-
Appellee.

* * * * *

*Nos. 89-35425,
* 89-35426
*
*D.C. Nos.
*CV-81-6385-FR
*CV-81-599-FR

* MEMORANDUM*
*
*
*
*
*
*

Appeal from the United States District
Court for the District of Oregon
Helen J. Frye, District Judge, Presiding

*This disposition is not appropriate for
publication and may not be cited to or by
the courts of this circuit except as pro-
vided by 9th Cir. R. 36-3.



Submitted May 8, 1990**
Portland, Oregon

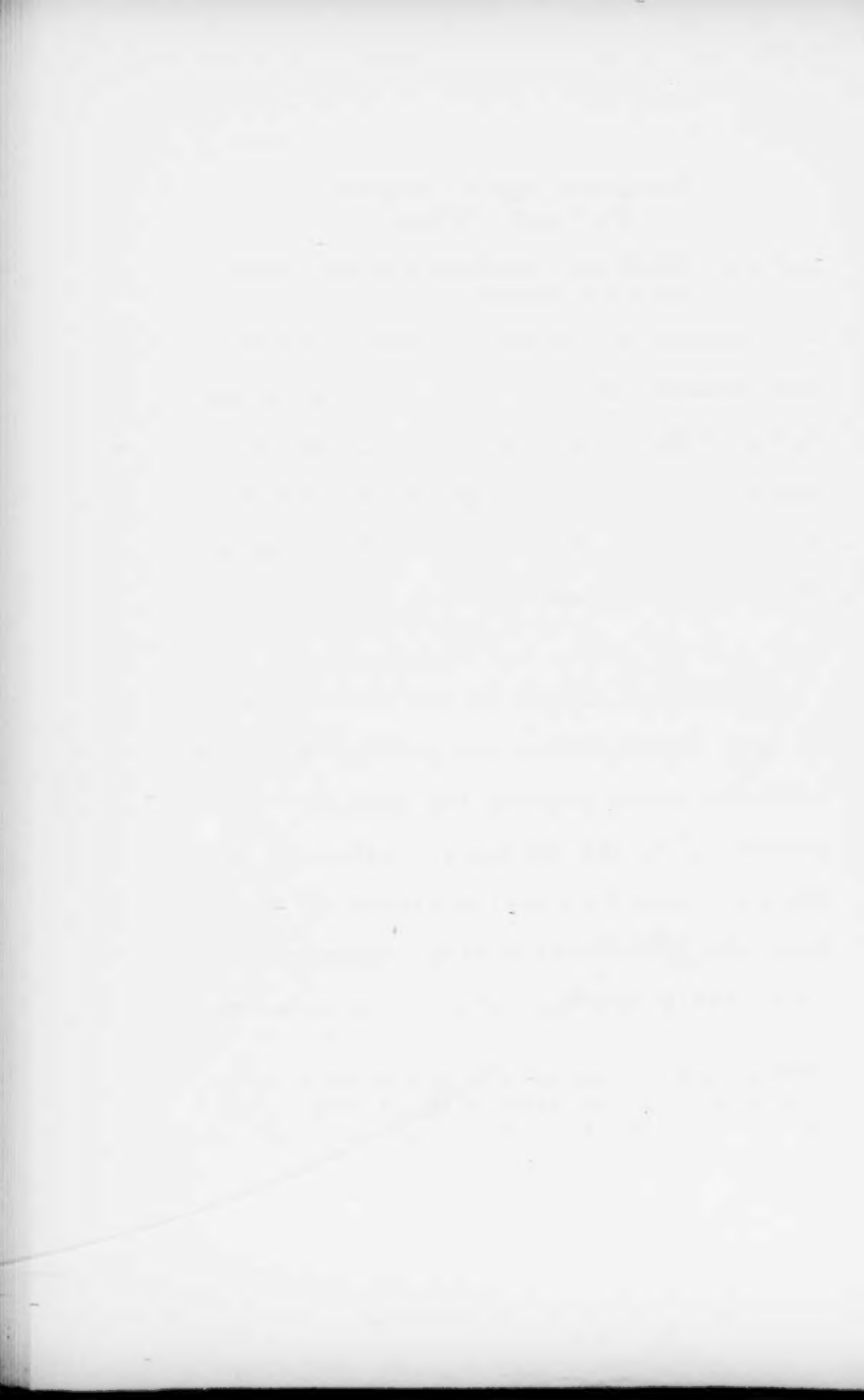
Before: BROWNING, ALARCON and KOZINSKI,
Circuit Judges.

Andrew G. Yartzoff appeals pro se the district court's Rule 41(b) dismissal (after remand for further findings) of his Title VII action against the administrator of the United States Environmental Protection Agency.

I

Yartzoff argues at the outset that no Rule 41(b) motion was pending when the district court granted the motion. The record is to the contrary. Although the district court initially stated it would deny the Rule 41(b) motion, defendant immediately asked permission"to make one

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.



or two points," to which the court replied, "All right." The court then took the matter "under advisement" and recessed for lunch. Upon reconvening, the court promptly granted the motion. RT at 56-59. The motion was thus alive and well when granted.

II

Yartzoff next challenges the district court's ruling on the merits. We must examine both the factual findings made by the district court, as well as its ultimate decision to dismiss. Johnson v. United States Postal Service, 756 F.2d 1461, 1464-1465 (9th Cir. 1985).

A

We review factual findings under a Rule 41(b) motion for clear error. Johnson, 756 F.2d at 1464. There was no such error here.

In remanding this case for further



or two points," to which the court replied, "All right." The court then took the matter "under advisement" and recessed for lunch. Upon reconvening, the court promptly granted the motion. RT at 56-59. The motion was thus alive and well when granted.

II

Yartzoff next challenges the district court's ruling on the merits. We must examine both the factual findings made by the district court, as well as its ultimate decision to dismiss. Johnson v. United States Postal Service, 756 F.2d 1461, 1464-1465 (9th Cir. 1985).

A

We review factual findings under a Rule 41(b) motion for clear error. Johnson, 756 F.2d at 1464. There was no such error here.

In remanding this case for further

findings on Yartzoff's claims of retaliatory employment practices, we cautioned Yartzoff that his evidence appeared to be weak, and that should his proof fail, "he may well suffer judgment for defense costs and attorneys' fees." Yartzoff v. Thomas, 809 F.2d 1371, 1378 (9th Cir. 1987).

On remand, Yartzoff offered no new evidence but merely repeated the same story he had told before. The district court's finding that Yartzoff had failed to show that his employment had been adversely affected was therefore not clearly erroneous.

B

We review de novo a district court's ultimate determination to dismiss pursuant to Rule 41(b). Johnson, 756 F.2d at 1465.



The relevant inquiry here is whether Yartzoff's employment was adversely affected. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); see also Yartzoff, 809 F.2d at 1374-1375. The district court found that by failing to present new evidence on remand, Yartzoff failed to show that any of the actions complained of adversely affected his employment. Since we found no adverse affects the first time this case came up on appeal, we have no basis for reversing the district court on this issue now.

AFFIRMED.

Filed
Apr. 14 1 41 PM '89
By _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ANDREW G. YARTZOFF,)	
Plaintiff,)	Civil No. 81-599-E-
v.)	FR
LEE M. THOMAS,)	Civil No. 81-6385-
Administrator, U.S.)	E-FR
Environmental Pro-)	
tection Agency,)	O P I N I O N
<u>Defendant.</u>)	

Andrew G. Yartzoff
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Plaintiff

Charles H. Turner
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438 Federal Building
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Attorneys for Defendant

FRYE, Judge:

The matters before the court are the
following motions of plaintiff, Andrew
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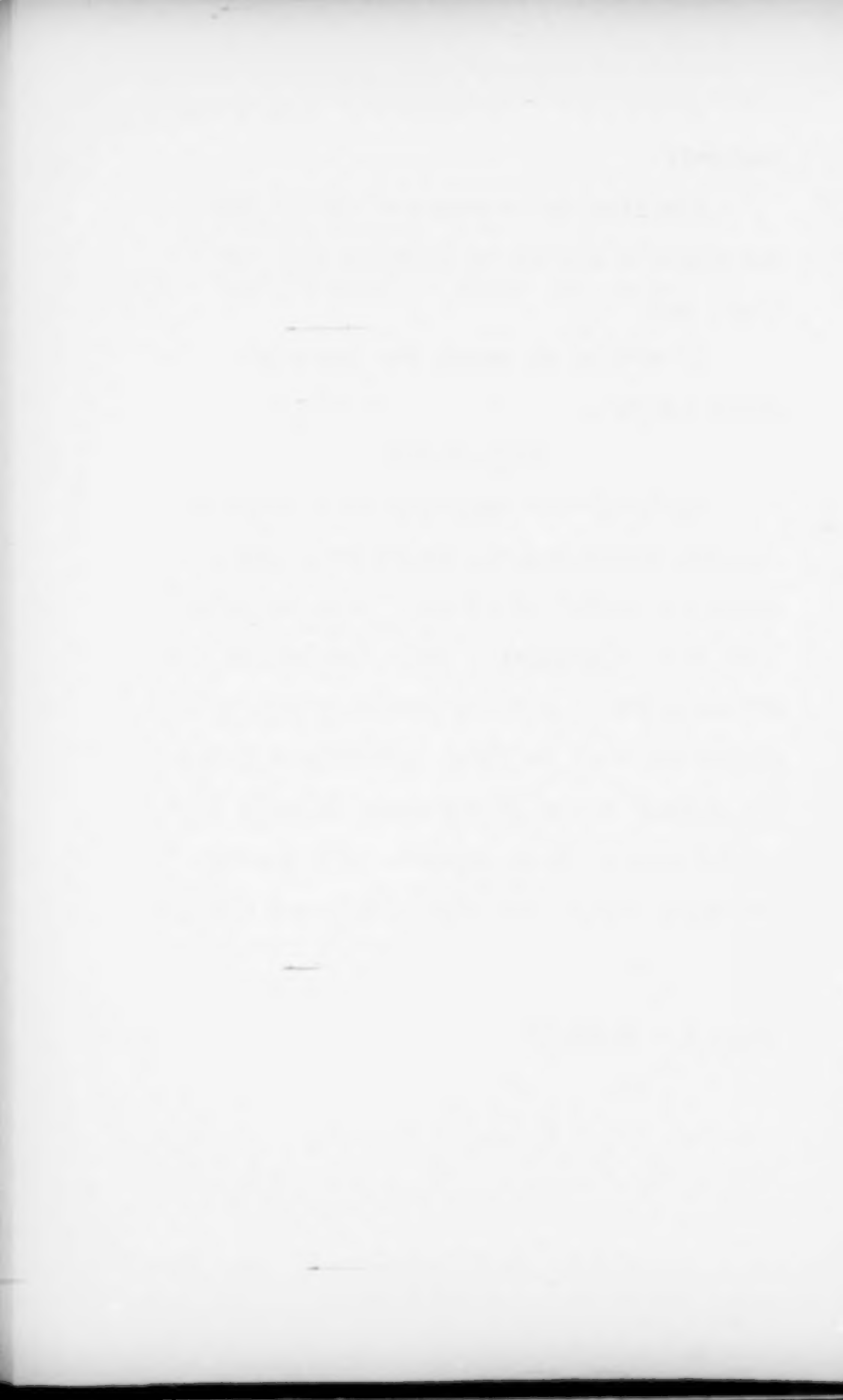
Yartzoff:

1) motion to reconsider (#133) the defendant's motion to dismiss this action, and

2) motion to amend the pretrial order (#135).

BACKGROUND

Yartzoff was employed as a chemist for the Environmental Protection Agency (EPA) in Corvallis, Oregon from December, 1972 until December, 1983. He joined the EPA as a GS-7, and his position was upgraded to GS-9 in 1975. This is a Title VII action in which Yartzoff alleges that in the period from August, 1979 through February, 1981, the EPA retaliated against

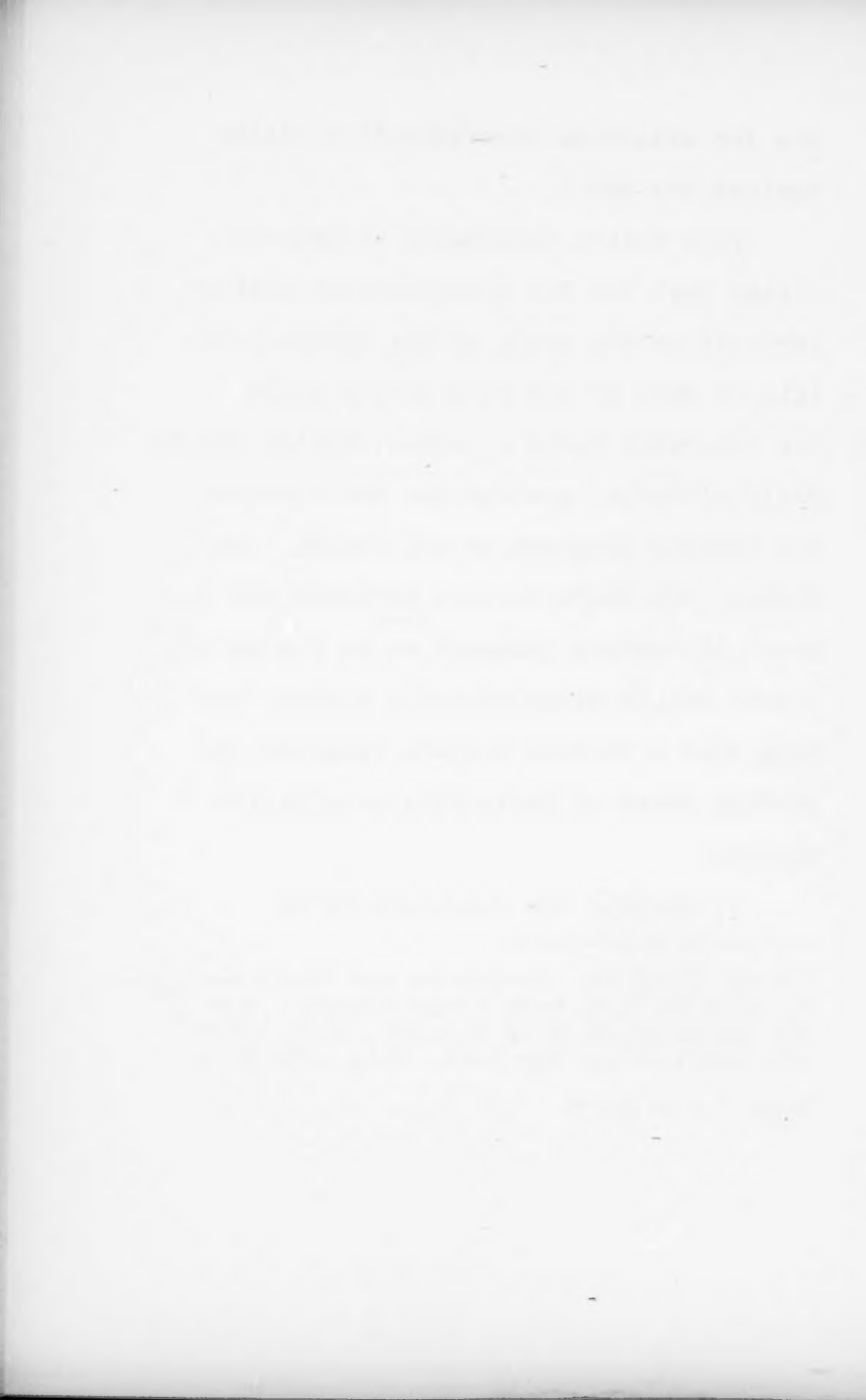


him for asserting discrimination claims against the EPA.¹

This action originally contained claims that the EPA discriminated against Yartzoff on the basis of his national origin as well as the retaliation claims. The Honorable James M. Burns, United States District Judge, granted the EPA's motion for summary judgment on all claims. On appeal, the Ninth Circuit affirmed the grant of summary judgment as to the national origin discrimination claims, but held that a factual dispute remained regarding three of Yartzoff's retaliation claims:

1) whether the reassignment or

¹Cases Civil No. 81-599-FR and Civil No. 81-6385-FR have been consolidated. For the purposes of this opinion, both cases are included in the term "this action."



nonassignment of work in August, 1979 through February, 1980 was in retaliation for filing complaints of discrimination and for participating in Title VII negotiations;

2) whether the April 28, 1980 performance rating of "below average in cooperation" was given in retaliation for filing complaints of discrimination; and

3) whether the reassignment or nonassignment of work in February, 1981 was in retaliation for filing complaints of discrimination. Yartzoff v. Thomas, 809 F.2d 1371 (9th Cir. 1987).

The remaining issues were tried to the court on October 12, 1988. Yartzoff appeared pro se and testified on his own behalf. After Yartzoff's case in chief, the EPA moved for dismissal pursuant to Fed. R. Civ. P. 41(b). The court granted the motion, finding that upon the

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facts and the law, Yartzoff showed no right to relief because there was no evidence of any damage to Yartzoff for which Title VII provides relief. Before the court was able to issue Findings of Fact and Conclusions of Law, Yartzoff filed the present motions.

DISCUSSION

1. Motion to Reconsider

The Ninth Circuit listed the elements of a prima facie case for retaliation in violation of Title VII in Yartzoff v. Thomas, supra, as follows: (1) "he (the plaintiff) engaged or was engaging in activity protected under Title VII, (2) the employer subjected him to an adverse employment decision, and (3) there was a causal link between the protected activity and the employer's action." 809 F.2d at 1375.

In this case, there is no dispute



that Yartzoff was engaging in activity protected under Title VII during the period from 1979 to 1981. There is also no dispute that the EPA gave Yartzoff a rating of below average in cooperation in April, 1980, or that Yartzoff's duties were changed to some extent between August, 1979 and February, 1980, and in February, 1981, although the EPA contends that any changes in Yartzoff's duties were within the scope of his job description and did not significantly change the position.

The issue before the court is whether the three incidents, as presented by Yartzoff's own evidence, caused him any damage for which Title VII provides relief. Yartzoff testified that he was not demoted, disciplined, suspended or terminated as a result of the three incidents listed above. Yartzoff further testified



that he received his usual in-grade step increases for salary purposes for the years 1979 through 1982.

However, Yartzoff contends that the three incidents had an adverse effect on him because the below average performance rating and/or the reassignment of job duties prevented him from being promoted to a higher grade or having his position upgraded to a GS-11 or GS-12. Title VII provides relief where 1) the plaintiff belongs to a class protected by Title VII; 2) -the plaintiff applied and was qualified for a job for which the employer was seeking applicants; 3) the plaintiff, despite being qualified was rejected; and 4) after the plaintiff's rejection, the position remained open and the employer continued to seek applications from persons of comparable qualifications. McDonnell Douglas Corp. v. Green,
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411 U.S. 792, 803 (1973).

At trial, Yartzoff did not present evidence regarding any promotion or reclassification requests that were not considered in the Ninth Circuit's prior decision in this action. In Yartzoff v. Thomas, supra, the Ninth Circuit held that there was no violation of Title VII as to 1) Yartzoff's request for reclassification of his position to GS-11 or GS-12 in March, 1979; 2) Yartzoff's letter requesting consideration for one of six new GS-11 chemist positions in April, 1979; and 3) Yartzoff's oral request for immediate promotion to GS-11 on April 4, 1980. 809 F.2d at 1374-75.

The Ninth Circuit held that due to the EPA's reduction-in-force program, the EPA neither sought applicants nor was able to give promotions. Id. at 1374. In addition, the Ninth Circuit found that Yartzoff failed to complete applications

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and otherwise comply with proper hiring and reclassification procedures. Id. These findings by the Ninth Circuit represent the law of the case and are binding on this court. Since Yartzoff has not presented evidence that he made other attempts to seek promotion or reclassification in the relevant period, this court cannot find that he was denied promotion or reclassification in violation of Title VII.

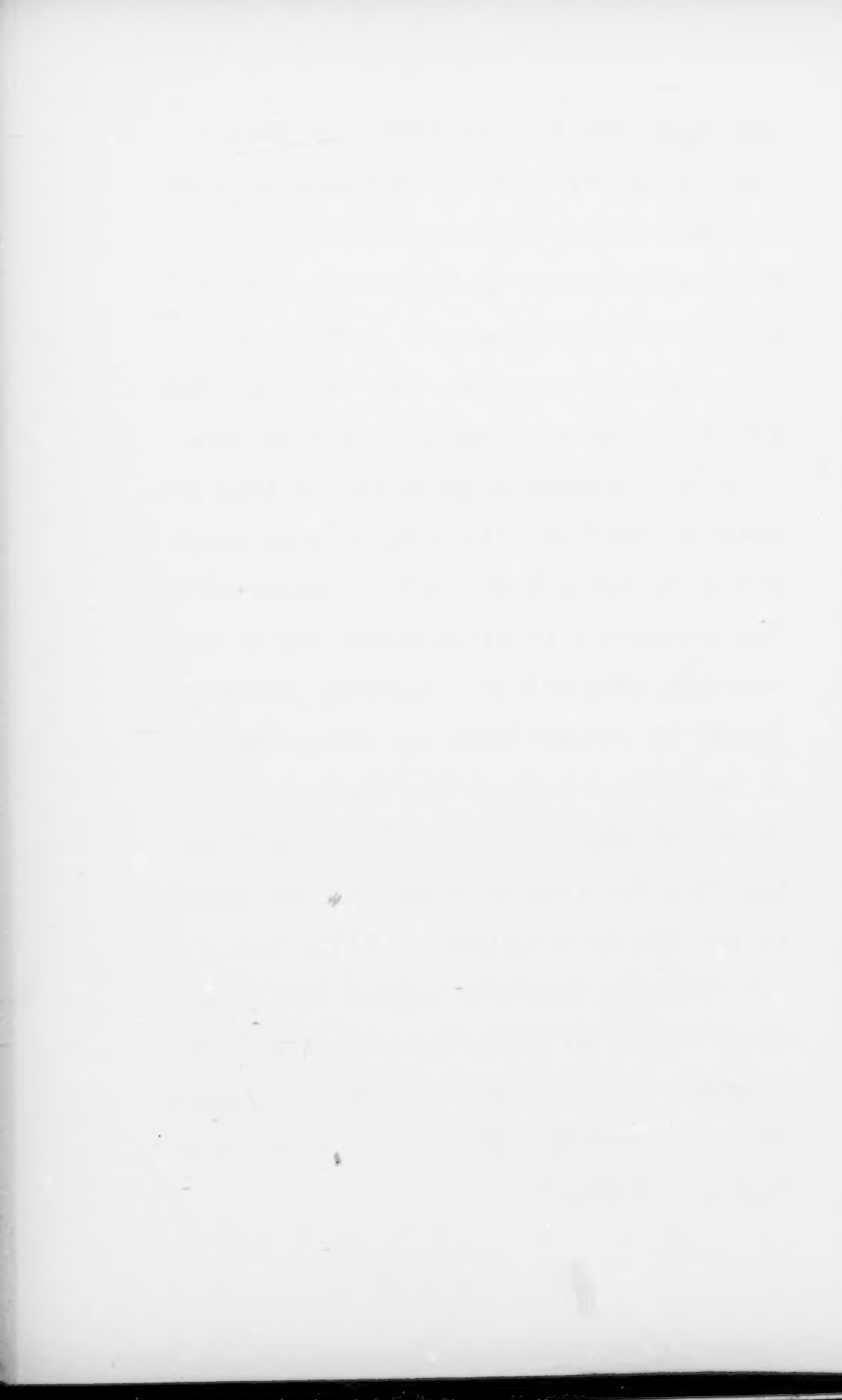
Yartzoff contends, however, that given the reduction in his job duties and his below average rating for cooperation, it would have been futile for him to apply for promotion or for reclassification. In unusual circumstances where a plaintiff shows that he was deterred from applying by the employer's discriminatory practices, failure to apply for a position does not vitiate a Title VII action.



Yartzoff, 809 F.2d at 1374. In this case, however, Yartzoff has made no showing that he was deterred from applying, but simply failed to follow the proper application procedures.

Yartzoff contends that various other adverse effects flowed from his failure to obtain promotion, such as the loss of pension benefits, the loss of experience and training, and the deterioration of the employment relation which led to his eventual termination. However, the EPA cannot be charged with any consequences of Yartzoff's failure to obtain promotion if the evidence does not support a finding that the loss of promotion was caused by the EPA in violation of Title VII.

Finally, Yartzoff argues that this court could, at least issue a declaratory judgment holding that the three incidents were retaliatory and issue an injunction



ordering the EPA to refrain from such retaliation. However, Title VII does not require a court to order relief where the injury was de minimus or where circumstances have changed so that the injury is unlikely to recur. Yartzoff was terminated from his position in 1983. Many of his supervisors and co-workers are no longer employed by the EPA.

This court finds that Yartzoff has not presented evidence which could support a finding that the three incidents caused any adverse impact to Yartzoff. Therefore, the motion to reconsider is denied.

2. Motion to Amend the Pretrial Order

Yartzoff moves to amend the pretrial order by adding page 13, which was inadvertently omitted from the pretrial order signed by the court. This page lists Yartzoff's contentions as to the relief he is seeking. The EPA does not object to the

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